1980

# Aleane Strong v. Alexander D. Strong : Brief of Respondent

Utah Supreme Court


Tim W. Healy; Attorney for Respondent JANE A MARQUARDT; Attorney for Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

ALEANE STRONG,

Plaintiff and Respondent,

vs.

ALEXANDER D. STRONG,

Defendant and Appellant.

Case No. 16880

# BRIEF OF RESPONDENT

Appeal from a final order of the Honorable Calvin Gould of the Second Judicial District Court of Weber County, Utah.

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# BRIEF OF RESPONDENT

## PRELIMINARY STATEMENT

This is an action in divorce in which Appellant appeals from the property distribution award made by the trial court. Appellant contends that the trial court erred in its valuation of the marital assets, thereby preventing an equitable distribution of the properties. Respondent believes that the trial court correctly valued the marital assets which were distributed to the respective parties.

## DISPOSITION IN LOWER COURT

This divorce action was tried in the Second Judicial District Court for Weber County, State of Utah, before the Honorable Calvin Gould, on September 21, 1979. On October 24, 1979, Judge Gould issued a Memorandum Decision (Record, p.54) dividing the marital properties between Respondent and Appellant. The terms of this Decision

were incorporated into the final Decree of Divorce (R.,pp. 66,67) which was signed by Judge Gould on December 31, 1979.

## RELIEF SOUGHT ON APPEAL

Respondent asks this Court to affirm the decision of the trial court recognizing the broad latitude and discretion given the trial judge in deciding these types of equity actions.

## STATEMENT OF FACTS

Respondent basically agrees with the statement of facts contained in Appellant's Brief but would add in the first paragraph of Appellant's Statement of Facts that the Appellant has not only a superior earning capacity but superior retirement rights as well. (R.,p.54). In addition a roto-tiller valued at $400 was awarded to Appellant. (R.,p.55).

## ARGUMENT

### POINT I - THE TRIAL COURT CORRECTLY VALUED THE WEST OGDEN REAL ESTATE CONCLUDING THAT APPELLANT'S MOTHERS' ONLY INTEREST IN SAID REAL ESTATE WAS THE $3600 DOWN PAYMENT WHICH SHE HAD MADE.

Trial testimony indicated that although Appellant's mother made an initial down payment of approximately $3600 on the West Ogden real estate in December 1976, (R., p.105, lines 6-9) Appellant and not his mother had made all subsequent, monthly contract payments. (R.,p.105, lines 14-17). The several statements made on page 5 of Appellant's Brief are clearly leading questions posed to Appellant and to his mother by Appellant's counsel and suggesting desired responses i.e. that Appellant's mother had a one-

half interest in said real estate.

Further it is clear that Appellant's business "Transactions Transmissions" which operated upon the West Ogden real estate was a sole proprietorship in the names of Appellant and Respondent as reflected on Schedule C of their joint federal income tax return. Depreciation of approximately $1800 was claimed by Appellant and Respondent for 1978 upon the building purportedly purchased by Appellant and his mother. (R.,p.36). At trial Appellant stated that he had an arrangement with his mother whereby he would claim the depreciation on the West Ogden property for certain years and his mother for others, but under questioning from the court, admitted that his mother had never yet claimed depreciation on that building. (R.,p.118, lines 3-12). Appellant's mother, Mrs. Cato, did not testify that she was to take depreciation on the building for certain years as was testified to by Appellant, but that Appellant and Respondent had taken all depreciation thereon. (R.,p.147, lines 5-6).

The marital income of Appellant and Respondent was used to make all payments on the West Ogden real estate subsequent to its purchase in December 1976. The $9200 gross income from the Transaction Transmission business in 1978 actually reflected a final loss of $1200 approximately after off-sets for depreciation, real property taxes, etc. In fact, Schedule C reflects a payment of $375 for 1978 by Appellant and Respondent for property taxes on the building purportedly purchased by Appellant and his mother as

partners. (R.,p.36). It is apparent that notwithstanding Mrs. Cato's name being on the purchase contract, in reality, Appellant dealt with the real estate as a marital asset which he held with Respondent rather than as a partnership asset which he held with his mother. In discussing the value of the West Ogden real estate at trial, reference was made to Appellant repaying his mother for her $3600 down payment assuming the value to be the same as when purchased. (R.,p.106, lines 24-27). This dialogue between Appellant and his counsel suggests that even though there may have been little or no equity in the property the Appellant desired to take marital assets to repay his mother the $3600 for her down payment. This would indicate that Appellant considered that down payment to be in the form of a loan as opposed to a true partnership interest. See also (R.,p.119, lines 18-26). That such was the true intent of Appellant and his mother is buttressed by the admission by Appellant that other items of marital property i.e. a motorcycle and van purportedly sold by Appellant to his mother in 1977 without the knowledge or consent of Respondent for the nominal price of $100 each were in reality security transactions securing the loan of those funds to Appellant rather than actual sales. (R.,p.104, lines 1-7). It is submitted that Mrs. Cato's interest in the West Ogden real estate was in essence a similar security transaction reflected in the $3600 down payment advanced by Mrs. Cato. Accordingly the stipulated appraised value of the West Ogden real estate of $57,500 in September

1979 (R.,p.52) less the mortgage balance of $39,000 (R.,p.132, lines 27-29) less Mrs. Cato's $3600 down payment correctly reflected a marital asset of $14,900 in the West Ogden property.

POINT II - THE TRIAL COURT DID NOT OVERVALUE THE TRANSACTION TRANSMISSIONS BUSINESS AWARDED TO APPELLANT.

It is plain from the evidence presented at trial that very low values were ascribed to the various vehicles which Appellant admitted he owned. Specifically illustrating this undervaluation is the testimony concerning the 1965 Chevrolet Corvair. Appellant estimated its value at $700 (R.,p.97, lines 1-19). However, Respondent testified that Appellant had refused to sell this car to an interested neighbor inasmuch as it was an antique and vintage car in very good condition which Appellant advised Respondent was worth up to $2,000. (R.,p.126, lines 6-26). It is apparent that the trial court believed Respondent's testimony regarding the value of the 1965 Corvair which perogative the court had every right to exercise. Using Appellant's own assigned values for the 1965 Buick i.e. $600 (R.,p.87, lines 19-24), the 1949 Studebaker i.e. $200 (R.,p.87, lines 25-27), 1963 International truck i.e. $200 (R.,p.87, lines 28-30), and a 1966 Buick Riveria i.e. $200 (R.,p.94, lines 3-15), coupled with Respondent's testimony regarding the $2,000 value of the 1965 Corvair (R.,p.126, lines 16-26), amounts to $3200 worth of automobiles.

In addition, specifically reflected in Schedule C of the federal income tax return of Appellant and Respondent (R.,p.37) is some $750 in tools depreciated in the Transaction Transmissions

business and acquired since 1973. Finally, the boat, trailer and motor which were also purportedly sold to Appellant's mother in 1977 for $100 (R.,p.41) and which had a recognized purchase value of approximately $900 (R.,p.91, lines 13-23) were not specifically provided for in the trial courts' distribution of assets. These items may well have been considered part of the paraphenalia and accoutrements connected with the transmission business, especially in light of Appellant's testimony that although the boat remained at Appellant's home until the divorce action in March 1979, it should have been at the garage along with the van and cycle. (R.,p.88, lines 14-26). The purported sale of the boat to Appellant's mother on May 26, 1977 is identical to that of the motor cycle and van., (R.,pp.41-43), and it is submitted a similarly intended security transaction only. Adding the $3200 of vehicles, $750 of tools and $900 representing the boat, trailer and motor, totals $4850 which is very near the $5,000 - $6,000 value assigned by the trial court to Transaction Transmissions business. The $4850 figure does not take into account any higher values the trial court may have ascribed to the vehicles owned by Appellant other than the 1965 Corvair. Also, the $4850 figure does not consider what value, if any, court gave to the good-will of the business itself. It is submitted that the business interests and property involved in the Transaction Transmissions business awarded to Appellant were not overvalued.

The valuation error assigned by Appellant regarding the furniture of the parties is minor and without merit regarding Appellant's request that this matter be remanded for a more equitable distribution and award of property. Appellant ascribed

a purported value of $2,000 to the furniture including in his calculations reference to a color T.V. (R.,p.107, lines 6-16). Respondent in her testimony gave the furniture an approximate value of $1700 although she emphasized that the color T.V. was 15 - 20 years old and not working. (R.,p.127, lines 8-24 and p.128, line 8). The court could correctly consider the non-functional T.V. in arriving at the $1500 figure. Finally, the minor variance in value between the $4850 figure for the "Transaction Transmissions" business and the $5,000 - $6,000 value given by the court and the $1700 value of the furniture given by Respondent and the $1500 figure used by the court are more than offset by the actual Civil Service Retirement accumulated by Appellant of $5425 (R.,p.80 lines 8-12) versus the $5,000 figure used by the court. (R.,P.55)

POINT III - THE TRIAL COURT HAS BROAD LATITUDE AND DISCRETION IN EQUITY MATTERS SUCH AS DIVORCE ACTIONS AND THE RESULTANT DISTRIBUTION OF MARITAL ASSETS.

Two of the cases cited in Appellant's Brief clearly reflect this position. In English v English 265 P2d 409 (Utah 1977) the Court reaffirmed its long standing position that the trial court in a divorce action has considerable latitude and discretion in adjusting the financial and property interests and the party appealing therefrom has the burden of proving that there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error or that the evidence clearly preponderated against the findings or that such a serious inequity resulted such as to manifest a clear

abuse of discretion. In English the only modification made with respect to the property of the parties was the reduction of alimony from $2,000 to $1,000 per month, as opposed to the elimination of alimony, which reduced alimony the Court found reasonable in view of a 20 year marriage, the husband's earnings, etc. In the instant case now on appeal despite a 16 year marriage and acknowledged superior earning capacity of the Appellant i.e. $17,154 vs. $4,145 of Respondent in 1978 (R.,p.78, line 6-7 and p.80, lines 18-30), no alimony was awarded. Instead the trial court adopted the position of Respondent that instead of receiving a 50% interest in all marital assets of the parties together with reasonable alimony (R.,pp.133-134), Respondent would be willing to waive her right to alimony and receive the equity in the family home together with its furnishings, her automobile, and her smaller Civil Service Retirement Fund and allow Appellant to receive the entire equity in the West Ogden real estate together with his Transaction Transmissions business, all tools, paraphenalia and accoutrements and automobiles connected therewith and his greater accumulated Civil Service retirement. (R.,p.141).

The other case cited by Appellant DeRose v DeRose 426 P2d 211 (Utah 1967) strongly supports the Judgment of the trial court in this appeal. In DeRose the trial court had split the assets of the parties with the provision that the defendant-husband receive a one-half equity interest in the family home at such time as the youngest child reached his majority or the wife remarried.

This Court modified the trial court judgment by awarding the wife the total equity in the family home stating that the basic objective of the decree is to make such an arrangement of property and economic resources of the parties in order that they will have the best possible opportunity to reconstruct their lives on a happy and useful basis and minimize friction. Again, in DeRose there was a clear disparity in the earning capacity of the husband and wife as has already been acknowledged by Appellant between himself and Respondent in this appeal. Further in this appeal Respondent testified that she regularly cooked meals, did the laundry and the regular household chores (R.,p.142, lines 25-27), and had only worked full-time outside the family home for a period of one year during the 16 year marriage, (R.,p.143. lines 1-2).

Utah is not a no-fault state. In this case it clearly appears that the precipitating cuase of this divorce was Respondent finding Appellant parked in a car at 2:00 A.M. kissing another woman, (R.,p.130, line 12), coupled with Appellant's physical beating of Respondent and his threat to kill her. (R.,p.131, lines 9-11). This was a fact that the trial court could properly consider in its distribution of property to the parties.

The trial court had the opportunity to hear the testimony of witnesses and to observe their candor or lack thereof and judge their credibility. In cases of conflict the Supreme Court assume that the trial court believed the evidence which supported its findings. Deference should be given to the trial court and

its decision upheld unless there clearly appears manifest and substantial error prejudicing the parties. Allen v Allen 165 P2d 872 (Utah 1946); Harding v Harding 488 P2d 308 (Utah 1971); Stone v Stone 431 P2d 802 (Utah 1967). Clearly no such error occurred in the pending appeal.

## CONCLUSION

The trial court correctly ruled that the West Ogden real estate was a marital asset of the parties in the amount of $14,900 after giving credit to Appellant's mother for her $3600 down payment which represented Mrs. Cato's sole financial contribution to said real estate. All monthly payments and property taxes upon the subject real estate were made from the marital income of Appellant and Respondent. Additionally, all depreciation of said real estate has been claimed by Appellant and Respondent in the sole proprietorship, "Transaction Transmissions", as reflected on Schedule C. of their federal income tax return.

The trial court correctly valued the Transaction Transmissions business at $5,000 - $6,000. Any variations therefrom were very minor in nature and were more than offset by the actual, accrued Civil Service Retirement of Appellant in the amount of $5425 versus $5,000 mentioned by the court in its award of property.

The trial court has broad latitude and discretion in divorce matters and may properly consider the significant disparity in earning capacity between Appellant and Respondent and the fault of the respective parties in making its distribution of property.

Accordingly, the Respondent respectfully asks this Court to affirm the judgment of the trial court.

DATED this 10 day of July, 1980.

Respectfully submitted,

TIM W. HEALY
Attorney for Respondent

CERTIFICATE OF DELIVERY

I hereby certify that on this 11 day of July, 1980, I hand delivered a copy of the foregoing document to the office of Appellant's attorney, Jane A. Marquardt, 543 25th Street, Ogden, Utah 84401.

TIM W. HEALY